PRIVATE LAW UPDATE
JANUARY 2021

Prudence Beaumont & Sasha Watkinson
Deans Court Chambers

A General Overview of Private Law Proceedings

> *"The judges at this court have an unprecedented amount of work. We wish to provide members of the public with the legal service that they deserve and need. However, if our lists are clogged up with this type of unnecessary, high conflict private law litigation, we will not be able to do so.*
>
> *To further explain the problem, I give these examples of similar requests for micromanagement that have arisen before me in the past month: i) At which junction of the M4 should a child be handed over for contact? ii) Which parent should hold the children's passports (in a case where there was no suggestion that either parent would detain the children outside the jurisdiction? iii) How should contact be arranged to take place on a Sunday afternoon? Other judges have given me many other, similar examples…*
>
> *Therefore, the message in this judgment to parties and lawyers is this, as far as I am concerned. Do not bring your private law litigation to the Family court here unless it is genuinely necessary for you to do so. You should settle your differences (or those of your clients) away from court, except where that is not possible. If you do bring unnecessary cases to this court, you will be criticised, and sanctions may be imposed upon you. There are many other ways to settle disagreements, such as mediation." (***HHJ Wildblood QC in ***Re B (a child) (Unnecessary Private Law Applications)*****)**

The position was reiterated in *View from the President's Chambers (November 2020)* citing statistics taken from the Family Solutions Group report - *What about me? Reframing support for families following parental separation* which suggested that about 40% of all separating parents bring issues about their children's care to the Family Court for determination.

The President encourages practitioners to consider the Family Solutions Group report commenting:

> *"If this figure is remotely accurate, it presents a startling and worrying picture. The number of private law applications continues to increase, which suggests that the trend is that more and more parents see lawyers and the court as the first port of call in dispute resolution, rather than as the facility of last resort as it should be in all cases where domestic abuse or child protection are not an issue"*

Domestic Abuse

The importance of identifying allegations of domestic abuse at the earliest opportunity and considering the provisions of **PD12J** is reiterated in a number of recent cases.

1. ***JH v MF*** **[2020] EWHC 86 (Fam)**

Appeal of HHJ Tolson QC's (previously DFJ!) findings in relation to a private law finding of fact hearing concerning allegations of sexual abuse and domestic abuse.

The judge's approach is extremely worrying showing a complete disregard for PD12J and a failure to acknowledge the realities of domestically abusive relationships. Russell J is clear that she regards the analysis undertaken by the judge in relation to these matters to be fundamentally flawed, at § 33:

> *"the judge's approach towards the issue of consent is manifestly at odds with current jurisprudence, concomitant sexual behaviour, and what is currently acceptable sociosexual conduct."*

In unpicking the issues of consent. Russell J is particularly scathing of the judge's findings at § 44:

> *Thus, the judge had accepted that "at a point during both occasions of intercourse the [Appellant] became both upset and averse to the idea of intercourse continuing. [My emphasis]" but he continued to reach the conclusion that had the Appellant done so it was not as a consequence of any action on the part of the Respondent because it was "something that was usual for her, the product of her past and her psychological state in not being able to take physical pleasure from sex." The judge went to say that "at no point do I find that the [Appellant] withdrew consent or conveyed to the [Respondent] any discomfiture that she was felling about intercourse continuing." The judge failed to explain the reasons for his findings; as to why, if it was evident to the judge that the Appellant had become averse to sexual intercourse continuing it was not evident to the Respondent; and, secondly, why it was acceptable for the Respondent to insist on sexual intercourse knowing that it was distressing and unwelcome to the Appellant. The evidence that the judge had rehearsed thus far did would not support such a finding nor did he give any or adequate reasons for preferring the evidence of the Respondent, other than the bald comment in paragraph 13 that he had found*

him to be "the more convincing witness, giving his evidence in a straight-forward, forthright manner…" ***The fact is that this judge had largely relied on his view that the Appellant had not vigorously physically fought off the Respondent.***

45. *Moreover, the judge did not consider or explain in his judgment why, as it was an accepted fact that the Appellant was unable to take physical pleasure from sex, there was no onus on the Respondent to establish that the Appellant was able to and was freely exercising her right to choose whether or not to participate in sexual intercourse.* ***The logical conclusion of this judge's approach is that it is both lawful and acceptable for a man to have sex with his partner regardless of their enjoyment or willingness to participate."***

Provides a summary of the following legal principles:

- Appeals [§4-5]
  Re F (Children) [2016] EWCA Civ 546
  Piglowska v Piglowski [1999] 1 WLR 1360

- Failure to give adequate reasoning [§24-27]
  V (A Child) (Inadequate Reasons for Findings of Fact) (2015) EWCA Civ 274
  Re A (Children) [2019] EWCA Civ 74

- Serious sexual assault in family proceedings – including discussion of the application of criminal law principles to family proceedings [§46-48]
  Re R (Children) (Care Proceedings: Fact Finding Hearings) [2018] 1 WLR 1821 : [2018] 2 FLR 718
  Re H-C [2016] 4 WLR 85

2. *Re D (A Child) (Appeal Out of Time)* [2020] EWHC 1167 (Fam)

Appeal of decision of DJ Greensmith (as then was) regarding findings made in May 2015 that the father had sexually abused his daughter. The notice of appeal was not lodged until November 2018, 3 and half years after the first instance decision!

"In spite of the very considerable passage of time, I have come to the clear conclusion that I must grant relief from sanctions, grant permission to appeal out of time, allow the appeal and remit the matter for re-hearing. The delay in this case is wholly exceptional and nothing in this Judgment is intended to alter the clear and long established principles relating to relief from sanctions and appealing out of time. I have decided, however, that the District Judge's findings are so unsafe and their consequences so serious that I cannot allow them to stand."

The errors in the case are manifest. The father is required to represent himself on the first day of the FoF hearing. The father indicates clearly that he does not feel able to represent himself as he has had insufficient time to prepare, he is dyslexic and he does not feel able to cross-examine the expert. The judge suggests that counsel for the mother can complete the cross-examination for both parties?!

The relevant legal provisions regarding appeals out of time are detailed at §33-56

3. <u>Assessing Risk of Harm to Children and Parents in Private Law Cases, June 2020</u>

The objective of the report was to consider: How effectively do the family courts respond to allegations of domestic abuse and other risks of harm to children and parent victims in private law children proceedings having regard to both the process and outcomes for the parties and the children?

In achieving this objective, the specific objectives of the call for evidence were:

• To understand how Practice Direction 12J, 2 Part 3A FPR 2010, 3 Practice Direction 3AA and section 91(14) orders 4 are being applied in practice and their impact, including the interaction of these Practice Directions with the risk of harm exception to the presumption of parental involvement.

• To understand the challenges relating to the application of the Practice Directions and section 91(14) orders.

• To explore the nature of any inconsistency in the application of the provisions.

• To understand the risk of harm to children and parent victims in continuing to have a relationship with a parent, or to be caused through contact orders to continue to have interaction with a parent perpetrator, where there is evidence of domestic abuse.

The report gathered evidence through questionnaires from a number of sources. Predominately the evidence considered information from lay parties (mainly mothers) with direct experience of the family justice system. Those individuals were self-selecting and there was no wider consideration of the case papers and therefore no objective analysis undertaken as to how the court reached its decision and whether the determination mirrored stated experience of the individual. A more limited amount of evidence was gathered from professionals working within the family justice system.

Recommendations [p.171 – 187]:

- A statement of practice be adopted for cases raising issues of domestic abuse or other risks of harm. The panel invited the President of the Family Division to promote this statement of practice.
- The presumption of parental involvement further reinforces the pro-contact culture and detracts from the court's focus on the child's individual welfare and safety. Therefore the

presumption of parental involvement to be reviewed urgently in order to address its detrimental effects.

- The family courts should pilot and deliver a reformed CAP in private law cases.
- A range of options for hearing from and advocacy, representation and support for children be explored more fully as part of piloting the reformed CAP.
- Enhanced special measures in accordance with the Domestic Abuse Bill
- In order to enable section 91(14) to protect children and adult victims more effectively from harm, the panel recommends that measures be included in the Domestic Abuse Bill to reverse the 'exceptionality' requirement for a section 91(14) order laid down most clearly in Re P (Section 91(14) Guidelines) [1999].
- Functioning mechanisms for communication, coordination, continuity and consistency be put in place at national and local levels – private law case and other family court proceedings; family courts and criminal courts; family courts and the police; family courts and MARACS; family courts and statutory and third sector agencies; family courts and therapeutic services.
- Urgent consideration to be given by police forces and the Family Court as to how police disclosure may be funded when parties are not legally aided and unable to fund it themselves.
- Additional investment to reduce delays in listing hearings; for CAFCASS; the family court estate; legal aid; funding for specialist assessments; DAPP; supervised contact centres; education resources; specialist domestic abuse and child abuse support services.
- Review of DAPPs to ensure they are more widely available and allow for self-referral.
- Training in the Family justice system.
- Social work accreditation for those completing risk assessments in private law proceedings.
- Increased monitoring and oversight.
- Further research.

4. ***R v P (Children: Similar Fact Evidence)*** **[2020] EWCA Civ 1099**

The appeal concerns the decision to exclude evidence from proceedings in another jurisdiction relating to the father's new partner which purportedly evidenced the father's controlling behaviour in this new relationship in similar terms to that alleged by the mother in her relationship with the father.

Peter Jackson LJ reminds of the following points:

• The broad power of the court to control evidence (FPR 2010, r.22.1).

• The admissibility of hearsay evidence in family proceedings.

• PD12J and its definition of coercive behaviour as *"an act or a pattern or acts of assault, threats, humiliation and intimidation of other abuse which is used to harm, punish or frighten the victim"*

• Reference to MOJ June 2020 document – Assessing risk of Harm to Children and Parents in Private Law Children Cases - the report notes that a focus on recent incidents may fail to acknowledge a pattern of behaviour over a long period of time and the failure of Scott schedules which may tend to disguise the subtle and persistent patterns of behaviour involved in coercive control, harassment and stalking.

• Baker J in Re LG (Re-opening of Fact-finding) [2017] EWHC 2626 (Fam)

Similar fact evidence in civil and family cases at § 23-28 considers a number of civil and criminal cases addressing the following points:

(a) Where it is contended that an individuals' behaviour in other circumstances makes it more likely that he will have behaved in the manner now alleged because it is evidence of propensity to behave in that way (O'Brien v Chief Constable of South Wales Police [2005] UKHL 26; [2005] 2 AC 534). Jackson LJ identifies that there are 2 questions that the judge must address in a case where there is a dispute about the admission of evidence of this kind:

1. Is the evidence relevant, as potentially making the matter requiring proof more or less probably? If so, it will be admissible

2. Is it in the interests of justice for the evidence to be admitted? This calls for a balancing of factors as identified in O'Brien

(b) Where the similar fact evidence comprise an alleged pattern of behaviour, the assertion is that the core allegation is more likely to be true because of the character of the person accused, as shown by conduct on other occasions. To what extent do the facts relating to the other occasion have to be proved for propensity to be established? (R v Mitchell [2016] UKSC 55 [2017] AC 571). In summary, the court must be satisfied on the basis of proven facts that propensity has been proven, in each case to the civil standard. The proven facts must form a sufficient basis to sustain a finding of propensity but each individual item does not have to be proved.

5. ***F v M*** **[2021] EWFC 4 (Fam)**

This case listed before Mr Justice Hayden is the remitted case of *R v P* [2020] as detailed above. The case considers two relationships in which F is the common denominator. The issue has been the admissibility of evidence in relation to the father's more recent relationship. F conceded that the evidence was admissible for the purpose of the hearing before Hayden J.

> *§5 It may be that a preliminary evaluation of the evidence before her led the Judge to conclude that it was sufficiently strong and cogent to be scrutinised in isolation. In my view, now having heard the case, I consider that it was. However,* ***the consideration of both***

> ***"cases" together served to illuminate the sinister, domineering and, frequently, tyrannising complexion of F's behaviour, to a degree which would not have been fully appreciated had the cases been severed. It is the chilling repetition of identical behaviours, with two very different women of different age and background, which casts evidential light and does so in each individual case.***

Hayden J makes extensive findings of coercive and controlling behaviour. At § 45 he highlights an extensive number of passages from the mother's police interview which illustrate '*the insidious and manipulative nature of coercive and controlling behaviour.* Hayden J comments that the police interviews "*reveal both her naivety and her failure fully to grasp the nature of the abuse that I find she was subjected to. This also serves to bolster the credibility of her evidence. Though her appreciation of what has happened to her has developed as she has matured, it is still incomplete. She relates her experiences in a way which reveal a complete ignorance of the paradigmatic pattern of controlling and coercive abuse she is* describing."

The judgment unpicks different aspects of the controlling behaviour – controlling money and food; communication with the outside world was gradually reduced; physical restraint; and gratuitous emotional torture of M's parents.

Hayden J draws attention to ***A County Council v LW & Anor*** **[2020] EWCOP 50**. A Court of Protection in which he highlights the need for vigilance when seeking to understand and identify coercive and controlling behaviour in the context of particularly vulnerable adults

> *§ 60 In my judgement, it is crucial to emphasise that* ***key to this particular form of domestic abuse is an appreciation that it requires an evaluation of a pattern of behaviour in which the significance of isolated incidents can only truly be understood in the context of a much wider picture****. The statutory guidance published by the Home Office pursuant to Section 77 (1) of the Serious Crime Act 2015 identified paradigm behaviours. In A County Council v LW (supra) I emphasised the features of that guidance which struck me as particularly apposite in the context of vulnerable adults. They are strikingly relevant here* [they are listed within the judgment]

The second relationship is described mostly from the perspective of the Ms J's family given her reluctance to give evidence. The judge directs the attendance of the Tipstaff at her home. The judge considers her to be an intelligent and impressive witness who refutes any suggestion that she is a victim and whilst refuses to give evidence engages in some discussions with the judge regarding the F's merits.

Hayden J set out the definition of 'coercive and controlling behaviour' as defined in the FPR 2020, PD12J and the offence under section 76, Serious Crime Act 2015 – Controlling or coercive behaviour in an intimate or family relationship [§103-105]. He refuses to adopt the approach as

suggested on behalf of Counsel for the applicant father as '*I do consider that a tight, overly formulaic analysis may ultimately obfuscate rather than illuminate the behaviour.'*

The Court endorses the general approach taken to evaluating evidence expressed by Peter Jackson J (as he then was) in **Re BR (Proof of Facts) [2015] EWFC 41** and **Baker J (as he then was) in Devon County Council v EB and Others [2013] EWHC 968** and notes that the FPR when broken down provides some useful guidance.

> §109 '*Key to assessing abuse in the context of coercive control is recognising that* ***the significance of individual acts may only be understood properly within the context of wider behaviour****. I emphasise* ***it is the behaviour and not simply the repetition of individual acts which reveals the real objectives of the perpetrator and thus the true nature of the abuse****.'*

Hayden J refuses to give guidance on the use of Scott Schedules but notes that may be of limited use when capturing the nature of coercive and controlling behaviour and notes the recommendations of the *Harm* report:

> *"It is, I hope, clear from my analysis of the evidence in this case, that* ***I consider Scott Schedules to have such severe limitations in this particular sphere as to render them both ineffective and frequently unsuitable****. I would go further, and* ***question whether they are a useful tool more generally in factual disputes in Family Law cases.*** *The subtleties of human behaviour are not easily receptive to the confinement and constraint of a Schedule. I draw back from going further because Scott Schedules are commonly utilised and have been given much judicial endorsement. I do not discount the possibility that there will be cases when they have real forensic utility. Whether a Scott Schedule is appropriate will be a matter for the judge and the advocates in each case unless, of course, the Court of Appeal signals a change of approach."*

Section 91(14)

The *Assessing Risk of Harm* report raises the question as to the use of section 91(14) and particularly whether it could be used more effectively. In 2019, there were a number of cases considering the use of section 91(14) which are useful to bear in mind.[1]

6. *SZ v DG & Ors* [2020] EWHC 881 (Fam)

[1] Section 91(14) cases:
- *Re P & N (Section 91(14): Application for Permission to Apply: Appeal)* [2019] EWHC 421
- *C1 and C2 (Child Arrangements)* [2019] EWHC B15 (Fam); *Re C3 and C4 (Child Arrangements)* [2019] EWHC B14 (Fam)
- *N (Children)* [2019] EWCA Civ 903

High Court case heard by Mostyn J. Father applied for an order for contact in respect of his son, ED. Father required the leave of the court as in January 2015 when making final orders disposing of substantive proceedings, Mostyn J imposed a leave requirement pursuant to the terms of section 91(14) until ED's 14th birthday (June 2026).

In the substantive proceedings reported as *D (A Child)* [2014] EWHC 3388 (Fam) – the Court found the father 'to be guilty of truly bestial conduct…offences of the utmost seriousness involving the gross abuse and exploitation of women and girls.'

The rationale for the section 91(14) order in 2015 is so that '*stability of the placement with the special guardians can be guaranteed, or at least, if not guaranteed, assured so far as is possible'* and that any such application would be put on the same footing as an application to discharge the special guardianship order itself.

The father's application for permission to seek contact was based on the return of the younger 3 children to his care, although he recognised the limitations of his case and only sought indirect contact with ED. The father's application for permission under section 91(14) was opposed by ED's Special Guardians.

The Court determines that the change in the father's circumstances were relatively recent and untested and whilst there was some weight in the argument that cultural understanding is the child's best interests, the Court refused the father's applications on the basis "I *place particular weight on the risk of disruption and on the views of the special guardians. I consider that the negative matters outlined in the Czech psychiatric/psychological report outweigh the positives. In the light of that I am not satisfied that the applicant would make a positive contribution to the well-being of ED.'*

7. ***Re C-D (A Child)*** **[2020] EWCA Civ 501**

Lewison LJ and Moylan LJ. Dismisses the appeal. Reminds that *Re P* is to be used with 'great care' but it is clear that that the circumstances in which a child's welfare will justify the making of such an order are many and varied. They are not confined to cases of repeated and unreasonable applications.

IMPORTANT NOTE: Court of Appeal four conjoined appeals is currently underway which consider private law proceedings and decisions made at Circuit Judge level in the last 18 months (2 of the cases relate to first instance decisions of HHJ Tolson QC). The appeals consider issues relating to domestic abuse and the application of PD12J.

Parental Alienation

The 2019 Cafcass guidance defines 'parental alienation' as:

> *"…**when a child's resistance or hostility towards one parent is not justified and is the result of psychological manipulation by the other parent**. It is one of a number of reasons why a child may reject or resist spending time with one parent post-separation… **Alienating behaviours present themselves on a spectrum with varying impact on individual children, which requires a nuanced and holistic assessment**. Our role is to understand children's unique experiences and how they are affected by these behaviours, which may differ depending on factors such as the child's resilience and vulnerability"*

There is an increased appreciation of the seriousness of a child being denied a relationship with a parent within private law proceedings as noted in the President's 2018 NAGLRO Speech:

> *"there is much more a link between these high-end private law disputes and adoption that might otherwise be appreciate"*

8. ***Re S*** **[2020] EWHC 217 (Fam)**

A case which concerned two children, Y aged 11 and X, aged 4 in public law proceedings which were issued within pre-existing private law proceedings concerning X. The local authority's case being that children had suffered or were likely to suffer significant emotional harm arising from false allegations against each of the fathers of the children of sexual and physical abuse. The mother went to extreme lengths to create video footage of the children which she purported to be evidence of the children alleging sexual and physical abuse. There was a concern within the local authority that the mother's behaviour may be an example of parental alienation.

Knowles J critiques the involvement of the local authority at paragraphs 61-70, with the scathing observation that '*it is my perception that local authorities may be ill-equipped to grapple with complex private law proceedings where there are allegations of abuse made by one parent against the other.'*

The court comments at paragraph 66 that the case was '*not a classic case of parental alienation'* on the basis that the mother permitted contact and there was no evidence of psychological manipulation to discourage the children from attending contact. It is suggested that the local authority may not have been alive to the elements of the case which distinguished it from more typical cases of parental alienation and in doing so points to a lack of relevant expertise.

The following guidance for professionals working with complex private law disputes is at paragraph 71:

*a) **repeated section 47 investigations**, which are not anchored to a comprehensive family assessment, **are ultimately of little benefit**;*
*b) **greater respect needs to be given to the views of professionals who see the family more often than most social workers** ever do;*
*c) in the interests of effective multi-disciplinary working**, social workers may, on occasion, have good reason to challenge the views of other professionals**. Ensuring other professionals understand the local authority's concerns and are updated as to recent events may assist that process;*
*d) **families should be referred to sources of guidance and support or offered it as part of the local authority's intervention**. This should happen sooner rather than later. The mother might well have benefitted from guidance about separated parenting and child development. Both parents would also have benefitted from advice and guidance in managing contact handovers and in communicating with each other about their child;*
*e) **mediation services** (aimed at separated parents and with appropriate expertise in dealing with complex contact cases) might have helped this family at an early stage of the proceedings;*
*f) **delay in commissioning expert assessments is damaging**. This case would have benefitted from an early specialist assessment which might have obviated the need for these proceedings;*
*g) **such cases require a high degree of professional skill from social workers and their managers and, in my view, should not be allocated to trainee or inexperienced social workers**. These can be some of the most frustrating and difficult cases to work because of the high levels of entrenched parental conflict into which children are inevitably drawn. Better training about the complex issues these cases demonstrate, such as repeated but unsubstantiated allegations of abuse, seems to me to be urgently needed both for local authority social workers and their managers.*

Consideration should also be given to the following 2019 cases:

***Re L (A Child)* [2019] EWHC 867 (Fam) –** the case seeks to resile from the commonly deployed phrase that a change of residence is 'a weapon or tool of last resort'[2] and endorses the approach of Sumner J in *Re C (Residence)* [2007] EWHC 2312 (Fam) and reminds that: '*The test is, and must always be, based on a comprehensive analysis of the child's welfare and a determination of where the welfare balance points in terms of outcome'.* Considers 'threshold' for a change of residence.

***T (Parental Alienation), Re* [2019] EWHC 3854 (Fam) –** the case charts an all too familiar journey of protracted proceedings from their instigation in March 2016 through to their conclusion in December 2019, blighted by delay, lack of judicial continuity and fruitless welfare reports. The judgment also contains a transition plan at Annex C and a summary of applicable law at Annex B which practitioners may find useful in navigating similar cases.

***Re H (Parental Alienation)* [2019] EWHC 2723 (Fam) -** Keehan J ordered a change of residence in relation to H, having determined that the mother had alienated H from the father and that the only means by which H could enjoy a relationship with both of his parents was to transfer residence to the father; nothing else will do in the welfare best interests of H. In summarising the applicable law,

[2] *Re A (Residence Order)* [2010] 1 FLR 1083, Coleridge J at para 21

Keehan J highlights the passage in *Re L* at §59. Criticism of a "woefully inadequate" section 37 report.

Re A (Children) (Parental alienation) [2019] EWFC - a cautionary tale. It is an exceptional case involving proceedings spanning 8 years including 36 court appearances and the involvement of at least 10 professionals. The proceedings concluded with the local authority seeking to withdraw its pubic law proceedings, the transfer of residence having catastrophically failed resulting in the children ultimately returning to the care of the mother with no contact with the father.

Surrogacy and HFEA

There have been a number of important recent judgments regarding surrogacy and HFEA. The following cases are of note:

9. *Re A (Surrogacy: s.54 Criteria)* [2020] EWHC 1426 (Fam)

Keehan J considers three issues:

i. application was made outside of the six-month time limit (s.54(3));
ii. whether at the time of the application the mother and father could be found to be "two persons who were living as partners in an enduring family relationship" (s.54(2)(c));
iii. and whether the child's "home" at the time of the application and the making of the order could be said to be with both applicants (s.54(4)(a)).

The case summarises the leading authorities and provides a summary of principles to be applied in determining whether or not the s.54 statutory criteria are met [§54].

10. *Y v Z* [2020] EWFC 39

Theis J considers provisions in HFEA 2008, s.54 to make a parental order where the child's intended father had died after embryo transfer but prior to the child's birth. Theis J considered the impact of *Ghaidan v Godin-Mendoza* [2004] All ER (D) 210 and cases which have enabled the court to "read down" the requirements in s.54, so they are compatible with Convention rights.

11. *X (A Child: child arrangements order)* [2020] EWFC 49

A case concerning a father's application for a child arrangement order in respect of a child conceived through artificial insemination. The application is refused and a s.91(14) order granted until March 2026 to allow a period of time for the child to settle. Indirect contact to continue on an annual basis.

12. ***Re C (A Child) (Parental Order & Child Arrangements Order) [2020]* EWHC 2141**

The finding of fact hearing was determined by Keehan J in April 2020 (***Re C (A Child) (Parental Order: Child Arrangements Order)* [2020] EWHC 2474 (Fam)**) in which it was found that the mother had lied about the father's consent to a second surrogacy arrangement. The court determined the parties' joint application for a parental order in respect of the elder child; dismissed the mother's application to re-opening findings of fact and granted F's application for the child to live with him.

Additional Cases of Interest

13. ***Manjra v Shaikh [2020] EWHC 1805 (Fam)***

Appeal of HHJ Hughes QC's decision to refuse to discharge a non-molestation order granted in 2016 and her subsequent substitution for an order which was expressed to "continue indefinitely".

Cobb J considers relevant statutory provisions at §15 onwards.

- Section 42 FLA 1996

- No definition of molestation in the statute, most comprehensive definition in PD12J:

> *"… any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment".*

• §17 - Victims of molestation or domestic abuse, in its many and varied forms, are entitled to the protection of the court through the grant of injunctions under the FLA 1996. It is well known that domestic abuse can and often does continue well beyond the point of relationship breakdown; many victims describe domestic abuse escalating after the point of separation. It seems to me, therefore, that protective orders should be made of a length which correlates to the risk which it is intended to guard against, and should be proportionate. Those accused of abusive behaviours are entitled to protections too: for a fair hearing, for a determination as required of the facts which are alleged, and against unwarranted restriction or interference of the State in their lives

• §18 - The language of section 42(7) might reasonably be interpreted as suggesting that a non-molestation order should have a finite limit in time, brought to an end either at a named or specified point, or at the latest by the making of a 'further order'.

• §19 - Galan v Galan [1985] FLR 905 in which the Court of Appeal confirmed that "[n]ormally an order for a short, fixed period will be the appropriate order, if any, for the court to make", and that while an order unlimited in time will not normally be appropriate, "there is nothing in the 1976 Act 4 expressly to limit the discretion of the court as regards the duration of the order" (Slade LJ).

• Cobb J considers that the above should be considered in light of amendments to FLA 1996 introduced on 1 July 2007 by DVCVA 2004 and guidance of Munby P in October 2014 - President's Practice Guidance: Family Court Duration of Ex Parte (Without Notice) Orders [2017] (18.1.2017).

Draws 2 points of principle from the guidance:

1. "An ex parte (without notice) injunctive order must never be made without limit of time. There must be a fixed end date. It is not sufficient merely to specify a return day";

2. "Careful consideration needs to be given to the duration of any order made ex parte (without notice). Many orders will be of short duration, typically no more than 14 days. But in appropriate cases involving personal protection, such as non-molestation injunctions granted in accordance with Part IV of the Family Law Act 1996, the order itself can be for a longer period, such as 6 or even 12 months, provided that the order specifies a return day within no more than 14 days. This must be a matter for the discretion of the judge, but a period longer than 6 months is likely to be appropriate only where the allegation is of long-term abuse or where some other good reason is shown. Conversely, a period shorter than 6 months may be appropriate in a case where there appears to be a one-off problem that may subside in weeks rather than months" (emphasis added by underlining).

• § 22 – Cobb J draws points together, as follows:

i. The FLA 1996 contemplates first and foremost that an order may be made for a specified period, or until "further order"; the expectation is that if there is no end date specified in the order, there will be an order bringing the injunction to an end;

ii. Adherence to the Practice Guidance: Family Court – Duration of Ex Parte (Without Notice) Orders is essential for all ex parte orders, and the principles should apply equally to on notice orders;

iii. It is, and has been for some time, good practice for orders to stipulate an end date; that date is likely to be no more than 12 months following the making of the order;

iv. There may still be circumstances where the court is entitled to conclude that a non-molestation order for a longer, or even an indefinite period, is justified; Hale LJ deprecated the suggestion that these orders should be made only 'exceptionally'. I suggest that the circumstances in which such orders are made will include cases where there is evidence of persistent molestation after the initial injunctive order; put another way, there may be cases where the court takes the view, on the facts,

and as the wife submitted to me in this case as a general point, that the requirement for protection from abuse has no foreseeable “end date”.

14. ***Re A (A Child) [2020] EWCA Civ 1230***

The father, a doctor, appealed against an order of HHJ Jacklin QC following a fact-finding hearing in private law proceedings. F sought contact with his 9 year old child. M opposed all forms of contact.

The judge found that F had poisoned the maternal grandfather, the maternal grandmother and M with thallium. This resulted in the death of the maternal grandfather, and M and the maternal grandmother becoming very seriously ill.

The Court of Appeal allowed the appeal and remitted the matter for rehearing before a High Court Judge.

The judgment details the authorities about the fallibility of oral evidence and witness recollection [§31-41]

40. I do not seek in any way to undermine the importance of oral evidence in family cases, or the long-held view that judges at first instance have a significant advantage over the judges on appeal in having seen and heard the witnesses give evidence and be subjected to cross-examination (Piglowska v Piglowski [1999] WL 477307, [1999] 2 FLR 763 at 784). As Baker J said in in Gloucestershire CC v RH and others at [42], it is essential that the judge forms a view as to the credibility of each of the witnesses, to which end oral evidence will be of great importance in enabling the court to discover what occurred, and in assessing the reliability of the witness.

41. The court must, however, be mindful of the fallibility of memory and the pressures of giving evidence. The relative significance of oral and contemporaneous evidence will vary from case to case. What is important, as was highlighted in Kogan, is that the court assesses all the evidence in a manner suited to the case before it and does not inappropriately elevate one kind of evidence over another.

50 It was the habit of the grandparents to make coffee and drink it on the veranda. On the relevant day, M came on to the veranda and drank about half of the grandmother's mug of coffee. During the morning, the grandmother drank the other half of her coffee and the grandfather finished his.

M's case was that when she came on to the veranda the morning in question, F had his back to her and she could see he was 'leaning over' the table where 2 cups of coffee were placed. Her case was that F did not turn to greet her but remained where he was for some moments before turning around.

The Court of Appeal agreed with F's submission that such an important finding of fact required an analysis of all the relevant evidence found in the statements and contemporaneous evidence, as well as caution on the part of the judge when considering the reliability of the detail within an account of events which had taken place 7 years ago. The judge clearly regarded the 'leaning over' finding to be, central to her conclusions that F had killed the grandfather and tried to kill the grandmother.

The judge inappropriately favoured an aspect of M's oral evidence over a significant amount of contemporaneous and written evidence without reference to that evidence or sufficiently explaining the reasons for doing so and that omission inevitably served to undermine the findings made against F.

15. ***LP v AE [2020] EWHC 1668 (Fam)***

Appeal against the order of HHJ Tolson QC who refused the application of M for a Legal Services Payment Order ("LSPO").

Mr Justice Cohen makes it abundantly clear that the approach of the judge was improper and refuses to adjourn the application until another day because by that stage "*the judge had the bit between his teeth"* although notes that *"family lawyers are brought up from an early age not to mix money and children. Sometimes that advice need not be slavishly followed and combined hearings can take place, particularly if a preliminary hearing, but to combine a hotly contested child arrangements hearing with a LSPO application should be avoided."*

Useful summary of the relevant law (§33). Cohen J dealt with the LSPO application rather than remitting in order to save further expense and delay. The F's costs were £560,000 and to demonstrate the intractable nature of the proceedings: the parties had spent £112,000 arguing over £87,000!

16. ***Emoni v Atabo* [2020] EWHC 3322 (Fam)**

Hearing before Mrs Justice Lieven considering an application by the F for a finding that the M is in contempt of court in relation to 4 orders. Proceeds in the absence of the M.

Considers the procedural rules and applicable case law [§17-34].

Procedural Rules

Part 37 of the Family Procedure Rules deals with the procedure for contempt. It was recently amended by Family Procedure (Amendment No 2) Rules 2020 [SI 758/2020]. The new rules aim to simplify and clarify the process for contempt applications and to bring it closely into conformity with the new rules in the Civil Procedure Rules.

The relevant definitions in r.37.2:

Rule 37.4(1) provides that unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.

Rule 37.4(2) sets out matters which must be included in the contempt application. The FPR does not specify the form to use for contempt applications in family proceedings. However, I am satisfied the applicant has used the appropriate form N600 to make this application.

Unless the court directs otherwise, the application and evidence in support must be served personally [r.37.5(1)]. The court has power to authorise alternative service and/or to direct that steps already taken to bring the application form to the attention of the Respondent by an alternative method is good service, in accordance with the rules on alternative service in Part 6.

It is clear from case law that the court may order service out of the jurisdiction by an alternative method: Wilmot v Maughan [2018] 1 FLR 1306, CA.

FPR r.37.8(1) states all hearings of contempt proceedings shall be listed and heard in public unless the court directs otherwise. This hearing has been in public.

Rule 37.8(7) states the judge and advocates shall appear robed. I am robed but gave Mr Wheeler dispensation from wearing robes given that this is a remote hearing.

At PD 37A para 2(2) it states:

"(2) The court may waive any procedural defect in the commencement or conduct of a contempt application if satisfied that no injustice has been caused to the defendant by the defect."

Case Law

In Re L (a Child) [2016] EWCA Civ 173, Mrs Justice Theis set out the following helpful and sensible guidance [at §78]:

> *"Before any court embarks on hearing a committal application, whether for a contempt in the face of the court or for breach of an order, it should ensure that the following matters are at the forefront of its mind:*
> *(1) There is complete clarity at the start of the proceedings as to precisely what the foundation of the alleged contempt is: contempt in the face of the court, or breach of an order.*
> *(2) Prior to the hearing the alleged contempt should be set out clearly in a document or application that complies with FPR rule 37 and which the person accused of contempt has been served with.*

(3) If the alleged contempt is founded on breach of a previous court order, the person accused had been served with that order, and that it contained a penal notice in the required form and place in the order.
(4) Whether the person accused of contempt has been given the opportunity to secure legal representation, as they are entitled to.
(5) Whether the judge hearing the committal application should do so, or whether it should be heard by another judge.
(6) Whether the person accused of contempt has been advised of the right to remain silent.
(7) If the person accused of contempt chooses to give evidence, whether they have been warned about self-incrimination.
(8) The need to ensure that in order to find the breach proved the evidence must meet the criminal standard of proof, of being sure that the breach is established.
(9) Any committal order made needs to set out what the findings are that establish the contempt of court, which are the foundation of the court's decision regarding any committal order.
79. Counsel and solicitors are reminded of their duty to assist the court. This is particularly important when considering procedural matters where a person's liberty is at stake."

In Egeneonu v Egeneonu [2017] EWHC 2336 (Fam), at §21(b) David Williams QC (as he then was) sitting as a Deputy Judge of the High Court, gave some helpful guidance. I am not going to read it all out but, in particular, at §21(b):

"To have penal consequences, an order needs to be clear on its face as to precisely what it means and precisely what it prohibits or requires to be done. Contempt will not be established where the breach is of an order which is ambiguous, or which does not require or forbid the performance of a particular act within a specified timeframe. The person or persons affected must know with complete precision what it is that they are required to do or abstain from doing. It is not possible to imply terms into an injunction. The first task for the judge hearing an application for committal for alleged breach of a mandatory (positive) order is to identify, by reference to the express language of the order, precisely what it is that the order required the defendant to do. That is a question of construction and, thus, a question of law."

And at §21(e):

"Contempt of court involves a contumelious that is to say a deliberate, disobedience to the order. If it be the case that the accused cannot comply with order then he is not in contempt of court. It is not enough to suspect recalcitrance. It is for the applicant to establish that it was within the power of the defendant to do what the order required. It is not for the defendant to establish that it was not within his power to do it. That burden remains on the applicant throughout but it does not require the applicant to adduce evidence of a particular means of compliance which was available to the accused provided the applicant can satisfy the judge so that he is sure that compliance was possible."

17. *W (Children: Reopening/Recusal) [2020]* EWCA Civ 1685

Appeal of HHJ Duggan considering an application to reopen findings and recusal of judge due to the appearance of bias.

Applications to reopen findings of fact in family proceedings [§26-28]

26. The remedy for a party who is aggrieved by findings of fact is to seek to appeal them. If an appeal is entertained, it will review the soundness of the findings and the fairness of the process. That is the normal procedure and it will apply in the great majority of cases.

27. There is a small subset of cases where new information comes to light that casts real doubt on the finding. In such a case, an application may be made for fresh evidence to be admitted on appeal, in accordance with the principles in Ladd v Marshall [1954] 1 WLR 1489. Alternatively, an application to reopen on the basis of new information may be made to the trial court, which will approach matters in this way:

"(1) It should remind itself at the outset that the context for its decision is a balancing of important considerations of public policy favouring finality in litigation on the one hand and soundly-based welfare decisions on the other.

(2) It should weigh up all relevant matters. These will include: the need to put scarce resources to good use; the effect of delay on the child; the importance of establishing the truth; the nature and significance of the findings themselves; and the quality and relevance of the further evidence.

(3) "Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial." There must be solid grounds for believing that the earlier findings require revisiting."

See Re E (Children: Reopening Findings of Fact) [2019] EWCA Civ 1447 at [50], approving Re B (Children Act Proceedings: Issue Estoppel) [1997] Fam 117 at 128.

28. It is rare for findings of fact to be varied. It should be emphasised that the process of reopening is only to be embarked upon where the application presents genuine new information. It is not a vehicle for litigants to cast doubt on findings that they do not like or a substitute for an appeal that should have been pursued at the time of the original decision. In Re E at [16] I noted that some applications will be no more than attempts to reargue lost causes or escape sound findings. The court will readily recognise applications that are said to be based on fresh evidence but are in reality old arguments dressed up in new ways, and it should deal with these applications swiftly and firmly. They must not be allowed to derail

52 ongoing proceedings, or to revive past proceedings in a way that wastes resources and is unfair to other parties. So, while it may be appropriate to refer a possibly meritorious application to the judge who made the original finding, that step, with its inbuilt delay, will not be necessary where the application is tenuous or worse. Meanwhile, the findings will remain in full effect unless and until they are varied; the mere fact that an application to reopen has been made will not alter that.

Recusal for the appearance of bias [§29-35]

29. In the determination of their rights and liabilities, everyone is entitled to a fair hearing by an impartial tribunal. Judges are bound to apply the law to the facts of the individual case as they find them and to shut their eyes to all extraneous considerations. They must act without partiality or prejudice, and any failure to do so violates one of the most fundamental principles underlying the administration of justice.

30. Instances of actual bias on the part of a judge are very rare and actual bias is difficult to prove because the law does not countenance the questioning of a judge about influences affecting his or her mind. Litigants are therefore protected if it is shown that there is an appearance of bias on the part of the judge, known for short as apparent bias.

31. The test for apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased.

32. These broad principles appear from the decisions in Locabail (UK) Ltd v Bayfield

Properties Ltd [2000] QB 451 at [2-3], Re Medicaments and Related Classes of Goods (No

2) [2001] 1 WLR 700, and Porter v Magill [2002] 2 AC 357 at [103], as recently endorsed by the Supreme Court in Halliburton Company v Chubb Bermuda Insurance Ltd. [2020] UKSC 48 at [52-53] and [68].

33. It is impossible to define the circumstances that may give rise to an appearance of bias as everything will depend on the facts: Locabail at [25]. The first stage is therefore to establish the facts: Medicaments at [85]. That will enable the parties to make submissions, the judge to make an informed decision, and a reviewing court to assess whether that decision was appropriate.

34. To establish the facts, the reviewing court may receive a written statement from the judge, specifying what he or she knew at any relevant time. It will not be bound to accept the statement at face value, but it will often have no hesitation in accepting its reliability. If it is shown that the judge did not know of the relevant matter, the danger of its having influenced his or her judgment is eliminated and the appearance of possible bias is dispelled. See Locabail at [18-19].

35. A judge would be as wrong to recuse himself in the face of a tenuous or frivolous objection as he would to ignore an objection of substance: Locabail at [21].

18. ***M v H (Private Law Vaccination)*** **[2020] EWFC 93**

The father's application initially concerned the MMR vaccine but widened to include each of the childhood vaccines that are currently included on the NHS vaccination schedule, the vaccinations that may be required in relation to future travel abroad by the children and vaccination against the coronavirus responsible for causing the COVID-19 infection.

MacDonald J refuses to determine the application in respect of travel vaccinations that may or may not arise in the future and refused to make a specific issue order regarding the vaccination of the children against the coronavirus responsible for causing the COVID19 infection.

At §4: "*I wish to make abundantly clear to anyone reading this judgment that* ***my decision to defer reaching a conclusion regarding the administration to the children of the vaccine against the coronavirus that causes COVID-19 does not signal any doubt on the part of this court regarding the probity or efficacy of that vaccine.*** *Rather, it reflects the fact that, given the very early stage reached with respect to the COVID-19 vaccination programme, it remains unclear at present whether and when children will receive the vaccination, which vaccine or vaccines they will receive in circumstances where a number of vaccines are likely to be approved and what the official guidance will be regarding the administration of the COVID-19 vaccine to children. As I make clear at the conclusion of this judgment, having regard to the principles that* ***I reiterate below it is very difficult to foresee a situation in which a vaccination against COVID19 approved for use in children would not be endorsed by the court as being in a child's best interests, absent peer-reviewed research evidence indicating significant concern for the efficacy and/or safety of one or more of the COVID-19 vaccines or a well evidenced contraindication specific to that subject child."***

Unsurprisingly the case focuses on the recent CoA case *Re H (A Child: Parental Responsibility: Vaccination)* [2020] EWCA Civ 664

Summary of the Law outlined at §32-

32. Section 3(1) of the Children Act 1989 defines parental responsibility as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property."

33. As I noted in H v A (No.1) [2015] EWFC 58, the rights, duties, powers, responsibilities and authority that comprise 'parental responsibility' are contingent in nature because they are inseparably connected with a parent's obligation to meet the welfare needs of his or her children and

arise out of that obligation. A parent's rights, duties, powers, responsibilities and authority insofar as they concern their children are only derived from their obligations as a parent and exist only to secure the welfare of their children (see Family Law Review of Child Law, Guardianship and Custody Law Com. 172 (1988) para 2.4 and Art 18 of the United Nations Convention on the Rights of the Child). Within this context the concept of parental responsibility "emphasises that the duty to care for the child and to raise him to moral, physical and emotional health is the fundamental task of parenthood and the only jurisdiction for the authority it confers" (see Introduction to the Children Act HMSO 1989 para 1.4).

34. Thus, in Re D (A Child) [2014] EWCA Civ 315 Lord Justice Ryder (as he then was) reiterated that the concept of parental responsibility describes an adult's responsibility to secure the welfare of their child, which is to be exercised for the benefit of the child not the adult. The status conferred by parental responsibility relates to welfare and not the mere existence of paternity or parenthood.

35. Within the foregoing context, the courts have repeatedly emphasised that in most cases it is in a child's best interests for both parents to have and to exercise parental responsibility for the child together. In this case, both parents have parental responsibility for P and T but they disagree fundamentally with respect to the best course of action in each child's best interests when it comes to vaccination.

36. Section 2(7) of the Children Act 1989 provides that where more than one person has parental responsibility, each of them may act alone and without the other (or others) in meeting that responsibility (although nothing in s 2(7) of the Act is to be taken to affect the operation of any enactment that requires the consent of more than one person in a matter affecting the child). However, Section 2(7) of the 1989 Act does not give one party priority over the other in the exercise of parental responsibility.

37. Within this context, whilst in Re H (A Child: Parental Responsibility: Vaccination) the Court of Appeal raised the question of whether, when there is a dispute between parents with parental responsibility regarding vaccination, that dispute should still continue to be a matter which must be brought to court, per Thorpe LJ in Re C (Welfare of Child: Immunisation) [2003] 2 FLR 1095, in Re H (A Child: Parental Responsibility: Vaccination) at [94] King LJ ultimately observed as follows:

"Regardless of whether immunisations should or should not continue to require court adjudication where there is a dispute between holders of parental responsibility, there is in my judgment a fundamental difference as between a private law case and a case concerning a child in care. In private law, by s.2(7) CA 1989, where more than one person has parental responsibility, each of them may act alone and without the other. Section 2(7) does not however give one party dominance or priority over the other in the exercise of parental responsibility. Each parent has equal parental responsibility, even though the day to day realities of life mean that each frequently acts alone. This applies particularly where the parties live in separate households and one parent is the primary carer. As Theis J put it in F v F at paragraph [21], "in most circumstances [the way parental

responsibility is exercised] is negotiated between the parents and their decision put into effect." As neither parent has primacy over the other, the parties have no option but to come to court to seek a resolution when they cannot agree."

38. Thus, where two parents with parental responsibility disagree as to the proper course of action with respect to vaccination, the court becomes the decision maker through the mechanism of a specific issue order made pursuant to its jurisdiction under s 8 of the Children Act 1989. When considering whether to grant a specific issue order requiring vaccination as being in each child's best interests, those best interests are the court's paramount consideration pursuant to s 1(1) of the 1989 Act and the court must have regard to the matters set out in the 'welfare checklist' contained in s 1(3) of the Children Act 1989 (Re C (Welfare of Child: Immunisation) [2003] 2 FLR 1095). Pursuant to s 1(5) of the 1989 Act the court should not make a specific issue order unless doing so would be better for the child than making no order at all. With respect to the matters that inform the exercise of the court's jurisdiction under s 8 of the 1989 Act where the parental dispute concerns vaccination, the courts have considered the issue in a number of cases.

39. In Re C (Welfare of Child: Immunisation) Thorpe LJ made clear that there is no general proposition of law that the court will not order vaccination in the face of rooted opposition from the child's primary carer. In Re B (A Child: Immunisation) [2018] EWFC 56 His Honour Judge Clifford Bellamy sitting as a High Court judge observed as follows at [93] to [94], in a passage expressly endorsed by the Court of Appeal in Re H (A Child: Parental Responsibility: Vaccination) at [74]:

"[93] In making that order, like MacDonald J, I make it clear that my judgment is not a commentary on whether immunisation is a good thing or a bad thing generally. I am not saying anything about the merits of vaccination more widely. I do not in any way seek to dictate how this issue should be approached in other situations. I am concerned only to determine what is in B's best welfare interests.

[94] That said, it is, in my judgment, appropriate to make the point that this is now the sixth occasion when the court has had to determine whether a child should be vaccinated in circumstances where a birth parent objects. On each occasion the court has concluded that the child concerned should receive the recommended vaccine (save that in Re C and F (Children) Sumner J decided that the older child, aged 10, should not have the HIB vaccine, because the danger for her had past, or the Pertussis vaccine, because there was no approved vaccine for a child of her age). With respect to the vaccines with which I am concerned, in the absence of new peer-reviewed research evidence indicating significant concern for the efficacy and/or safety of one of those vaccines, it is difficult to see how a challenge based on efficacy or safety would be likely to succeed."

40. Finally, as ***I have noted and within the foregoing context, in Re H (A Child: Parental Responsibility: Vaccination) the Court of Appeal undertook a comprehensive review of this area. Whilst that case concerned public law proceedings under Part IV of the Children Act 1989, the Court of Appeal also reviewed the position in private law proceedings under Part II of the 1989***

***Act**. Within the context of its meticulous and comprehensive review of the historical background and the case law, the Court of Appeal articulated the following conclusions with respect to the vaccination of children generally:*

(i) It cannot be doubted that it is both reasonable and responsible parental behaviour to arrange for a child to be vaccinated in accordance with the Public Health Guidelines but there is at present no legal requirement in this jurisdiction for a child to be vaccinated.

(ii) Although vaccinations are not compulsory, scientific evidence now establishes that it is generally in the best interests of otherwise healthy children to be vaccinated, the current established medical view being that the routine vaccination of infants is in the best interests of those children and for the public good.

(iii) All the evidence presently available supports the Public Health England the advice and guidance that unequivocally recommends a range of vaccinations as being in the interests both children and society as a whole.

(iv) The specific immunisations which are recommended for children by Public Health England are set out in the routine immunisation schedule which is found in the Green Book: Immunisation against infectious disease, published in 2013 and updated since.

(v) The evidence base with respect to MMR overwhelmingly identifies the benefits to a child of being vaccinated as part of the public health initiative to drive down the incidence of serious childhood and other diseases.

(vi) The clarity regarding the evidence base with respect to MMR and the other vaccinations that are habitually given to children should serve to bring to an end the approach whereby an order is made for the instruction of an expert to report on the intrinsic safety and or efficacy of vaccinations as being necessary to assist the court to resolve the proceedings pursuant to FPR Part 25, save where a child has an unusual medical history and consideration is required as to whether the child's own circumstances throw up any contra-indications.

(vii) Subject to any credible development in medical science or peer reviewed research to the opposite effect, the proper approach to be taken by a court where there is a disagreement as to whether the child should be vaccinated is that the benefit in vaccinating a child in accordance with Public Health England guidance can be taken to outweigh the long-recognised and identified side effects.

(viii) Parental views regarding immunisation must always be taken into account but the matter is not to be determined by the strength of the parental view unless the view has a real bearing on the child's welfare

(ix) This approach to the medical issues does not act to narrow the broad scope of the welfare analysis that is engaged when considering the best interests of the child with respect to the question of vaccination.

41. Finally with respect to the law, the mother contends that a specific issue order requiring the vaccination of the children would breach their right to respect for private and family life under Art 8 of the ECHR. Within this context, I note that in Re K (Forced Marriage: Passport Order) [2020] EWCA Civ 190 at [44] the President endorsed the approach to proportionality in Bank Mellat v HM Treasury (No 2) [2013] 3 WLR 179 a follows:

"[44] Further, I, like Moylan LJ, would specifically draw attention to the approach that is to be adopted to an assessment of proportionality as described by Lord Reed JSC in Bank Mellat v HM Treasury (2) as set out in paragraph 33 of Moylan LJ's judgment. All four of the elements in the four part test in Bank Mellat are important and, for completeness, the full test is:

(1) whether the objective of the measure pursued is sufficiently important to justify the limitation of a fundamental right;

(2) whether it is rationally connected to the objective;

(3) whether a less intrusive measure could have been used without unacceptably compromising the objective; and

(4) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

(See Bank Mellat: Lord Sumption at [20]; and especially on question (3), per Lord Reed at [70] to [71] and [75] to [76])."

MacDonald J makes a specific issue order requiring each of the children to be given each of the childhood vaccines that are specified on the NHS vaccination schedule with the father to be responsible for arranging the same and ensuring T and P are taken to the GP for scheduled immunisations for the remainder of their childhood.

Although the Court of Appeal did not reach a definitive conclusion on the question of whether, in private law proceedings, the question of vaccination should or should not continue to require court adjudication where there is a dispute between holders of parental responsibility, the observations of the Court of Appeal in in Re H (A Child: M v H (Private Law: Vaccination) [2020] EWFC 93 whilst strictly obiter, make it very difficult now to foresee a case in which a vaccination approved for use in children, including vaccinations against the coronavirus that causes COVID-19, would not be endorsed by the court as being in a child's best interests, absent a credible development in medical

science or peer-reviewed research evidence indicating significant concern for the efficacy and/or safety of the vaccine or a well evidenced medical contraindication specific to the subject child.

PRUDENCE BEAUMONT & SASHA WATKINSON
DEANS COURT CHAMBERS
JANUARY 2021